Supreme Court, U.S.

(1)

NO.: 98 959 DEC 9 1998

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PRECISION CUTTING SERVICES, INC.,

Petitioner,

vs.

KING OCEAN CENTRAL AMERICA, S.A.

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an ocean carrier issues a through bill of lading which includes inland transportation in the United States by motor carrier, and which provides that the ocean carrier will be vicariously liable for any loss while the goods are in the custody of the inland motor carrier, and the goods are lost while in the custody of the inland motor carrier who has issued a separate bill of lading, is the ocean carrier as a matter of law subject to the Carmack Amendment and the Carmack two-year statute of limitations for the inland leg of the journey, or is the ocean carrier's liability governed by the carriage of goods by sea act (COGSA), the terms of the bill of lading, and the COGSA one-year statutes of limitations when the clear language of COGSA makes it effective only during the ocean voyage ("tackle to tackle") and the clear language of Carmack makes it effective during the entire overland carriage?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

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IN FAVOR OF RESPONDENT, KING
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PRECISION CUTTING SERVICES, INC.,

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On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to

review the merits appears at Appendix B, page 1-15 to the petition and is King Ocean v. Precision Cutting Services, Inc., 717 So.2d 507 (Fla. 1998). The opinion of the Florida District Court of Appeals appears at Appendix C, page 1-11 to the petition and is reported at 696 So.2d 824 (Fla. 1997).

JURISDICTION

The date on which the highest state court decided my case was January 12, 1998. A copy of that decision appears at Appendix B, page 1-15. A timely petition for rehearing was thereafter denied on the following date: September 10, 1998, a copy of the order denying rehearing appears at Appendix A, page 1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Carriage of Goods by Sea Act (C.O.G.S.A.) 46 U.S.C. Sec. 1300 et. seq.

The Carmack Amendment, 49 U.S.C. § 14706, formerly 49 U.S.C. § 11707, formerly 49 U.S.C. § 20 (11).

STATEMENT OF THE CASE

King Ocean Central America, S.A. (King ocean), contracted with Precision Cutting Service, Inc. (Precision). In May 1993 to transport Precision's goods from Costa Rica in Central America to Miami, and then overland from Miami to Little Rock, Arkansas via motor carrier. In its through bill of lading, King Ocean agreed to be vicariously liable for any loss or damage to Precision's goods while they were

in the custody of the inland carrier, Paradise Freightway, Inc. A specific provision in the King Ocean-Precision bill of lading required any claims to be filed against King Ocean within one year. A separate bill of lading covered the inland portion of the transport by Paradise. Precision's goods were then stolen during the inland portion while the goods were at Paradise's Miami freightyard.

Over a year later, Precision filed an action against King Ocean to recover damages for the stolen goods. The trial court entered summary judgment in favor of King Ocean after finding that the suit was barred by the one-year statute of limitations in the Carriage of Goods by Sea Act, 46 U.S.C. App. § 1303 (6) (1992), better known as COGSA, which was expressly incorporated into the parties' contract. On appeal to the Third District, Precision argued that a separate federal law, referred to as the Carmack Amendment, 49 U.S.C. § 11707 (1992), rather then COGSA, was controlling, and therefore the one-year statute of limitations was inapplicable. The Third District agreed with Precision based on its earlier opinion in Harvest International, Inc. v. Tropical Shipping & Construction Co., 644 So. 2d 112 (Fla. 3d DCA 1994). The majority opinion reasoned that, as in Harvest International, because the domestic inland portion of the transport from a foreign country was covered by a separate bill of lading, the Carmack Amendment was applicable and therefore the trial court erred in granting summary judgment based on COGSA's one-year statute of limitations. Precision Cutting Services, Inc., 696 So.2d at 825-26.

The questions presented by this petition is of great importance to the public in general and to shippers of goods specifically.

At the present time hundreds if not thousand of manufacturers of clothing and other cloth items send

cut goods to foreign countries for sewing into the finished product. The finished product is then loaded into shipping containers and transported back to the manufacturer. Thousands of containers are stolen or pilfered each year thereby imposing on the general public the additional cost of the received product which must be increased by the manufacturer to cover the cost of the product in instances where they are unsuccessful in collecting from the carrier for their losses.

Obviously there is very little opportunity for theft or pilferage of below deck cargo containers during a sea voyage so losses at sea are usually easy to establish such as by collision or water damage from a storm, therefore most losses that result in litigation occur during the overland carriage of the containers where it is more difficult and time consuming to investigate the loss and file suit. In cases of pilferage it is particularly difficult.

Therefore, the important question is should an ocean shipping carrier who agrees to be liable for intermodel carriage of goods from a foreign post to an inland U.S. destination be able to avoid the clear intent of congress that the shipper have at least 2 years to bring suit for overland losses and impose on the shipper a one-year limitation period? Which in many cases is not sufficient time and the carrier is released.

There exists presently in the field of International Carriage of Goods by intermodel transportation (in most instances by vessel from foreign ports, and then by truck or rail to the ultimate destination and vice versa) a conflict between two federal statutes, 46 U.S.C. § 1300 et. seq. (The Carriage of Goods by Sea Act or C.O.G.S.A.) contains a 1 year statute of limitations and 49 U.S.C. 14706 formerly 49 U.S.C. 11707 formerly 49 U.S.C. 20 (11) (The Carmack Amendment) or "Carmack"

which provides that a limitation cannot be less than 2 years.

The clear intent of congress in enacting these statutes was for C.O.G.S.A. to govern exclusively the portion of the transportation from the foreign port to the U.S. port ("tackle to tackle") and for Carmack to govern exclusively the portion of the transportation overland to the ultimate destination inland.

Originally the shipper would engage a ocean shipping company for the ocean voyage and a trucking company or railroad or both for the overland portion of the trip. In recent years however, enterprising ocean shipping companies have developed the practice of offering intermodel transportation from the foreign port all the way to the ultimate inland U.S. destination. The reasons are twofold: 1) its saves the shipper from having to hire more than one carrier and 2) it allows the shipping company to make extra profit by charging the shipper a higher fee and hiring an overland carrier for a lesser fee.

ARGUMENT

The Carriage of Goods by Sea Act has no application to loss or damage to goods during inland transportation. Federal Ins. Co. v. American Export Lines, Inc., 113 F.Supp. 540 (S.D.N.Y. 1953)

> ("The Carriage of Goods by Sea Act does not apply of its own force to cargo after it has left the ship's tackle").

46 U.S.C. § 1301 (e) expressly provides: "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 1311 provides:

"Nothing in this Act shall be construed as

superseding . . . any law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship."

The Florida Supreme court clearly erred in holding the COGSA statute of limitations applicable to this loss of goods occurring long after the time the goods were discharged from the ship.

King Ocean concedes that COGSA the statute has no application, thus the Florida Supreme Court necessarily erred in so holding. King Ocean argues instead a contractual adoption of COGSA as a new alternative not raised in the trial court. Unfortunately, the King Ocean Bill of Lading does not incorporate COGSA to control inland loss of goods. The contract in this case provides:

4. CARRIER'S RESPONSIBILITY

The Carrier undertakes responsibility from the place of receipt (if named herein) or from the port of loading to the port of discharge or the place of delivery (if named herein) as follows:

(1) If it can be proved that the loss or damage occurred while the Goods were in the custody of an inland carrier the liability of the Carrier and the limitation thereof shall be determined in accordance with the inland carrier's contracts of carriage and tariffs, or in the absence of such contracts or tariffs, in accordance with the international law of the state where the loss or damage occurred. [e.s.].

[2] Where loss or damage has occurred between the time of receipt of the Goods by the Carrier

at the port of loading and the time of delivery by the Carrier at the port of discharge, or during any prior or subsequent period of carriage by water, the liability of the Carrier shall be determined as follows:

a) If the carriage is to or from the United States of America, the "Carriage of Goods by Sea Act of 1936" (COGSA) of the United States of America, shall apply.

b) For carriage in all other trades, the "International Convention for Unification of certain Rules relating to Bills of lading", dated Brussels, August 25, 1914 (The Hague Rules, concluding Article IX), shall apply except when the "Hague Visby Rules" (dated Brussels, February 23, 1968) are compulsively applicable at the port of loading in which case the "Hague Visby Rules" shall apply.

(3) Where it cannot be established where the loss or damage occurred the liability of the Carrier shall be determined in accordance with sub-paragraph 2 above.

Under the express contractual paragraph (2)(a), COGSA only applies where loss occurs during carriage by water to or from the United State. Since it is undisputed that the loss occurred while the goods were in the custody of an inland carrier, under paragraph (1)

> "the liability of the Carrier [King Ocean] and the limitation thereof shall be determined in accordance with the inland carrier's [Paradise Freightways'] contracts of carriage."

In this case, here are no time limitations for filing suit under the Paradise Freightways' contract. The

Paradise Freightways' bill of lading is governed by the Carmack Amendment.

Even if the Paradise Freightways' contract is ignored, liability is "in accordance with the international law of the state where the loss or damage occurred." The law of the United States governing interstate motor transport is the Carmack Amendment and the rules of regulations of the Interstate Commerce Commission.

Under the express terms of King Ocean's bill of lading quoted above, COGSA has no application to this loss occurring while the goods were in the custody of the inland carrier. The Florida Supreme Court's holding the COGSA statute of limitations applicable is unsalvageable under any theory.

The Carmack Amendment does not contain a statute of limitations as such. To the contrary, it precludes contractual limitations on commencement of suit. The Carmack Amendment provides:

> "A carrier or freight forwarder may not provide by rule, contract, or otherwise, . . . a period of less than 2 years for bringing a civil action against it under this section."

49 U.S.C. § 11707 (e). This suit was timely under Carmack.

The Carmack Amendment applies to the circumstances of this case, i.e., the transportation of goods in the United States under the continuation of foreign commerce provisions of the Interstate Commerce Act. "Therefore, the Carmack Amendment is applicable to this case." 644 So.2d 113.

The Carmack Amendment states that a common carrier providing transportation "subject to the jurisdiction of the Interstate Commerce Commission under sub-chapter I, II, or IV of chapter 105 of this title" is liable for the actual loss of property

caused by a carrier "over whose line or route the property is transported in the United States." 49 U.S.C. § 11707 (a)(1). The jurisdiction of the Interstate Commerce Commission under sub-chapters I, II, and IV of chapter 105 is over (I) transportation that is "in the United States and is between a place in . . . the United States and a place in a foreign country," 49 U.S.C. § 10501(a)(2)(G); (II) transportation between a place in "the United States and a place in a foreign country to the extent the transportation is in the United States," 49 U.S.C. § 10521 (a)(1)(E); and (IV) transportation

> "by water carrier and rail carrier or motor carrier between a place in the Untied States and a place outside the United States, to the extent that . . .the transportation is provided in the United States," 49 U.S.C. § 10541 (a)(3)(A).

In Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986), cert. den., 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987), the court spelled out the statutory basis for Carmack applicability to circumstances as are present in the case:

> The Carmack Amendment applies when the ICC has jurisdiction over the shipment in question, 49 U.S.C. § 11707 (a). Among the shipments over which the ICC has jurisdiction are shipments "between a place in . . . the Untied States and a pace in a foreign country to the extent the transportation is the United States . . . . 49 U.S.C. § 10521 (a)(1)(e) (the "continuation of foreign commerce" provision). [799 F.2d at 699].

ICC jurisdiction and the applicability of the Carmack Amendment cannot be manipulated or defeated with the presence or absence of separate bills of lading or receipts for goods in transit between a

place in a foreign country and a place in the United States, to the extent the transportation is in the Untied States. Section 11707(a)(1) provides: "Failure to issue a receipt or bill of lading does not affect the liability of a carrier or freight forwarder."

Swift Textiles makes the clear that Carmack Amendment applicability does not turn upon the vagaries or technicalities of the underlying bills of lading:

> The nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by "the essential character of the commerce," [citation omitted], reflected by the "intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement." [799 F.2d at 699].
>
> ***
>
> In our case, it cannot be disputed that the shipment was intended to begin in Switzerland and end in LaGrange, Georgia. There was no reason for the container to come to rest in Savannah other than for the consignee's customs broker to make arrangements for the Savannah to LaGrange leg of the journey. Applying the "intent" analysis, the fact that Watkins issued a separate bill of lading for the final intrastate leg of the journey is not significant. [Citation omitted]. Thus, the shipment was a "continuation of foreign commerce," the Carmack Amendment applied to the shipment. [799 F.2d at 700].

See also, Fine Foliage of Florida, Inc. v. Bowman Transportation, Inc., 698 F.Supp. 1566 (M.D. Fla. 1988), affd., 901 F.2d 1034 (11th Cir. 1990),

where the Carmack Amendment applied to the inland portion of a foreign/interstate shipment.

> "The Carmack Amendment applies when the ICC has jurisdiction over the shipment in question, 49 U.S.C. §11707 (a)." Swift Textiles . . . Not only does the ICC have jurisdiction over interstate shipments, but also it has jurisdiction over shipments "between the United States and a place in a foreign country to the extent the transportation is in the United States," under its "continuation of foreign commerce" provision. [698 F.Supp. At 1571].

Here it is apparent that the movement of the container by motor carrier from Sun Terminal to Sun Depot to the Paradise yard, with the intent to complete its transport to Little Rock, Arkansas, was a shipment over which the ICC has jurisdiction under the "continuation of foreign commerce" provision. The Carmack Amendment applies and the Florida Supreme Court erred in holding otherwise.

REASONS FOR GRANTING THE PETITION

This petition should be granted because there exists a serious conflict between the express terms of the Carriage of Goods by Sea act and the ruling of the 11th Circuit, on the one hand the ruling of the supreme court of Florida on the other hand and that conflict must be resolved to bring order and continuity to the law governing the international shipment of goods and from inland U.S. locations.

COGSA (46 U.S.C. § 1301 (e)) expressly provides "The term carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

The 11th Circuit has held in Swift (supra) and

Fine Foliage (supra) that Carmack applies during the overland portion of the transportation.

The Supreme Court of Florida below has ruled that COGSA governs the inland portion of the transportation.

There lies the conflict.

In the Supreme Court of Florida to have the final word on this important issue of Federal Law.

CONCLUSION

For the reasons stated above it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Precision Cutting Services, Inc., Petitioner

Date: December 4, 1998

SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 10, 1998

KING OCEAN CENTRAL AMERICA S.A.,	*	
Petitioner,	*	
v.	*	CASE NO. 91,033
PRECISION CUTTING SERVICES, INC.,	*	District Court of Court of Appeal 3rd District
Respondent	*	No. 96-1463

* * * * * * * * * * * * * * * * * *

Respondent' Motion for Rehearing and Clarification is hereby denied.

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS and ANSTEAD, J.J., concur.

TC

cc: Hon. Mary Cay Blanks, Clerk
Hon. Harvey Ruvin, Clerk
Hon. Leonard Rivkind, Judge

A True Copy

TEST:

"s/Sid J. White"
Sid J. White
Clerk, Supreme Court

Mr. Richard B. Austin
Mr. Gerhardt A. Schreiber
Mr. James C. Blecke
Mr. Rex B. Guthrie
Mr. John B. Pappas
Mr. Scott J. Frank
Mr. Paul C. Huck
Mr. Manuel A. Garcia-Linares

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Third District

WHEREAS, in that certain cause filed in this Court styled:

KING OCEAN CENTRAL AMERICA, S.A.
v.
PRECISION CUTTING SERVICES, INC.

Case No.: **91,033**

Your Case No.: **96-1463**

The attached opinion was rendered on: **June 12, 1998**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Major B. Harding, Chief Justice of the Supreme Court of Florida and Seal of said Court at Tallahassee, the Capital, on this 10th day of September, 1998.

"s/Sid J. White"
Clerk of the Supreme Court of Florida

SUPREME COURT OF FLORIDA

KING OCEAN CENTRAL AMERICA, S.A.,

Petitioner,

vs.

PRECISION CUTTING SERVICES, INC.,

Respondent.

No. 91,033

[June 12, 1998]

ANSTEAD, J.

We have for review the decision in Precision Cutting Services, Inc. v. King Ocean Central America, S.A., 696 So. 824 (Fla. 3d DCA 1997). We accepted jurisdiction to answer the following questions certified to be of great public importance:

> WHERE AN OCEAN CARRIER ISSUES A THROUGH BILL OF LADING WHICH INCLUDES INLAND TRANSPORTATION IN THE UNITED STATES BY MOTOR CARRIER, AND WHICH PROVIDES THAT THE OCEAN CARRIER WILL BE VICARIOUSLY LIABLE FOR ANY LOSS WHILE THE GOODS ARE IN THE CUSTODY OF THE INLAND MOTOR CARRIER, AND THE GOODS ARE LOST WHILE IN THE CUSTODY OF THE INLAND MOTOR CARRIER WHO HAS ISSUED A SEPARATE BILL OF LADING, IS THE OCEAN CARRIER AS A MATTER OF LAW SUBJECT TO THE CARMACK AMENDMENT AND THE CARMACK TWO-YEAR STATUTE OF LIMITATIONS FOR THE INLAND LEG OF THE JOURNEY, OR IS THE OCEAN CARRIER'S LIABILITY GOVERNED BY THE CARRIAGE OF GOODS BY SEA ACT (COGSA), THE

TERMS OF THE BILL OF LADING, AND THE COGSA ONE-YEAR STATUTE OF LIMITATIONS?

Id, at 829. We have jurisdiction. Act V, §3(b)(4), Fla. Const. For the reasons expressed below, we quash the Third District's decision and hold that the ocean carrier's liability is governed by the Carriage of Goods by Sea Act (COGSA), the specific provisions of the parties' through bill of lading, and the one-year statute of limitations found in COGSA and the bill of lading.

MATERIAL FACTS[1]

King Ocean Central America, S.A. (King Ocean), contracted with Precision Cutting Services, Inc. (Precision), In May 1993 to transport Precision's goods[2] from Costa Rica in Central America to Miami, and then overland from Miami to Little Rock, Arkansas via motor carrier. In its through bill of lading, King Ocean agreed to be vicariously liable for any loss or damage to Precision's goods while they were in the custody of the inland carrier, Paradise Freightway, Inc. A specific provision in the King Ocean-Precision bill of lading required any claims to be filed against King Ocean within one year. A separate bill of lading covered the inland portion of the transport by Paradise. Precision's goods were then allegedly stolen during the inland portion while the goods were at Paradise's Miami freightyard.

Over a year later, Precision filed an action against King Ocean to recover damages for the stolen goods. The trial court entered summary judgment in favor of King Ocean after finding that the suit was barred by the one-year statute of limitations in the

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1 The following facts are from the district court's opinion. Precision Cutting Services, Inc., 696 So.2d at 825.

2 The shipment consisted of 990 cartons of finished Levi's Dockers slacks.

Carriage of Goods by Sea Act, 46 U.S.C. App. § 1303 (6) (1992), better know as COGSA, which was expressly incorporated into the parties' contract. On appeal to the Third District, Precision argued that a separate federal law, referred to as the Carmack Amendment, 49 U.S.C. § 11707 (1992), rather than COGSA, was controlling, and therefore the one-year statute of limitations was inapplicable. The Third District agreed with Precision based on its earlier opinion in Harvest International, Inc. v. Tropical Shipping & Construction Co., 644 So.2d 112 (Fla. 3d DCA 1994). The majority opinion reasoned that, as in Harvest International, because the domestic inland portion of the transport from a foreign country was covered by a separate bill of lading, the Carmack Amendment was applicable and therefore the trial court erred in granting summary judgment of limitations. Precision Cutting Services, Inc., 696 So.2d at 825-26. Judge Cope disagreed with the majority's result and reasoning arguing that Harvest International was "wrongly decided." However, he concurred because Harvest International remains binding precedent in the Third District. Id. at 826 (Cope, J., specially concurring).

LAW AND ANALYSIS

As noted in the district court's opinions and by the parties in their briefs, the issue presented is not one of liability. There is no dispute that King Ocean expressly voluntarily subjected itself by contract to vicarious liability for any loss or damage done to Precision's goods while they were in the custody of the inland carrier, Paradise Freightway, Inc., Precision Cutting Services, Inc., 696 So.2d at 825; Precision Cutting Services, Inc., 696 So.2d at 829 n.5 (Cope, J., specially concurring). Rather, the issue raised in the certified questions is the applicable law and its corresponding statute of limitations as well as the effect of the one-year limitation provision set out in the parties' contract.

BILLS OF LADING

Precision and King Ocean entered into an agreement for the shipment of Precision's goods by King Ocean by executing a through bill of lading. A bill of lading is a "document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods." See UCC § 1-201 (6) (1995). The value of a bill of lading is found in the multiple roles that it plays: first, it is the best evidence of the contract of carriage between the carrier and the seller; second, it serves as the receipt for the goods under transport; and third, it is a the goods under transport; and third, it is a document of title to property which can be endorsed and negotiated. See William Tetley, Marine Cargo Claims, (3d ed. 1988).

A "through bill of lading" may be thought of as a bill of lading with "long legs." It is designed "for the carriage of goods from one place to another by several shipowners or railway companies." Sir Thomas Edward Scrutton. Charterparties and Bills of Lading, 72 (9th ed. 1919). The through bill of lading emerged as international trade developed in the latter half of the nineteenth century, especially between the United States and Europe. See generally Thomas Gilbert Carver, Carriage of Goods by Sea (6th ed. 1918). As to its legal import. Carver wrote that:

> When a contract for a through journey is made with a carrier or contractor, he is answerable for its complete performance, although it may be intended that some part of the carrying shall be done by others, unless the contract expressly limits his liability to his own part of the journey.
>
> Apart, then, from such a limitation, the first carrier with whom the contract is made may be liable for a breach of it after the goods have left his hands. But the carrier in whose hands they were when the breach was committed is also generally liable, if the

> through contract was made for his benefit, and with his authority; and, on the other hand, he is entitled to the benefit of the exceptions of liability which the contract may contain.

Id. at 162 (citations omitted). Put another way,

> [a] pure through bill of lading is a contract whereby the first carrier contracts to carry from point "A" to point "B" and on to final destination 'C[]'. The goods are received and the first carrier carriers to point 'B', and a second carrier carries to point 'C[]' There even may be intermediate carriers, but in every case the claimant, may call upon the first carrier for any loss along the route whether or not the loss took place in the first carrier's hands.

William Tetley, Marine Cargo Claims, 253 (1965). More recently, the Seventh Circuit Court of Appeals has defined a through bill of lading as one "issued in a foreign country to govern a shipment throughout its transportation from abroad to its final destination in the United States." Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394 (7th Cir. 1992).

COGSA

In 1936 Congress adopted the Carriage of Goods by Sea Act (COGSA). Ch. 229, § 3,49 Stat. 1208 (1936) (codified at 46 U.S.C. app. §§ 1300-1315). COGSA was the domestic enactment of the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, better known as the Hague Rules. Michael F. Sturley, Proposed Amendments to the Carriage of Goods by Sea Act, 18 Hous. J. Int'l 609, 610 (1996). The Hague Rules and COGSA were intended to bring more balance to the merchant/shipper-carrier relationship an overcome some of the overly advantageous contract clauses in the bills of lading, which were traditionally drafted by the carriers. See Tessler

Brothers (B.C.) Ltd. v. Italpacific Line, 49 F.2d 438, 444 (9th Cir. 1974)(footnote and citation omitted) (recognizing that Congress passed COGSA and its predecessor statute "to counteract the persistent efforts of carriers, who are the drafters of ocean bills of lading, to insert all embracing exceptions to liability"). Indeed, the legislative history of COGSA reveals that one of its specific purposes was "to obviate the necessity for a shipper to make a detailed study of the fine print clauses of a carrier's regular bill of lading on each occasion before shipping a package." Id. At 445[3].

Nevertheless certain COGSA provisions, especially section 1303(6) (one-year state of limitations for bringing a civil suit, beginning with the date the goods were delivered or should have been delivered), and section 1304(5) (limiting the carrier's and the ship's liability to no more than $500 per package or customary freight unit), clearly benefit carriers.[4]

3

A review of COGSA's legislative history confirms that observation. Specially, the House of Representatives report found that "[t]he uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities: to underwriters who insure the cargo and are met the same difficulties: and to bankers who extend credit upon the bills of lading." H. Rep. No. 2218, 74th Cong. 2d Sess. 7 (1936).

Both houses of Congress recognized the broad support for COGSA from all concerned interests, including shippers, carriers, bankers, and marine underwriters. H. Rep. No. 2218 at 1-3 (characterizing support as "universal demand" for the legislation): S.Rep. No. 752 at 3.

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COGSA is ambiguous as to whether independent contractors, such as stevedores, are similarly cloaked with its liability limitations. After the United States Supreme Court ruled that a defendant stevedore could not receive the benefit of the

CARMACK AMENDMENT

On the other hand, the Carmack Amendment to the Interstate Commerce Act was passed by Congress in 1906; Ch. 3591, §7, 34 Stat. 595 (1906); and governs the liability of U.S. inland common carriers for lost or damaged goods. Rini v. United Van Lines, Inc., 104 F.3d 502, 503 (1st Cir. 1997). As the First Circuit recently reiterated:

> [T]he principal purpose of the Amendment was to achieve national uniformity in the liability assigned to carriers. It is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been therefore subject . . . . The importance of uniformity has frequently been stressed in subsequent Supreme Court decisions.

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carrier's $500 unit limitation in Robert C. Herd& Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959), carriers began inserting specific clauses in their bills of lading to extend protection to their employees, agents, and independent contractors, such as the stevedor in Herd. In the English case that give those clauses their name, Adler v. Dickson, 1 Q.B. 158 (C.A. 1954), a passenger injured on the steamship "Himalaya." Mrs Adler sued the mster and boatswain in tort because she could not sue the carrier, which was conracutally exempt from all liability. The master and the boatswain did not receive the benefit of the carrier's liaiblity exemption because the conract between Mrs. Adler and the company did not have a clause extending the excemption t them. Thus, Mrs. Adler won her case.

Consequently, so-called Himalaya clauses are not a standard feature in most carriers' bill of lading. A model clause provides that: "All defenses [of the Carrier] shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether suedin contract or tort." Michael F. Sturley, An Overview of the Considerations Inolved in Handling the Cargo Case, 21 Tul.Mar. L.J. 263 353 (1997) (quoting Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285, 286 Himalaya clause is incorporated into paragraph 3.(2) of King Ocean's bill of lading.

Id. at 504 (internal quotations and citations omitted). As repeatedly reaffirmed by the United States Supreme Court, the purpose of the amendment was to

> "relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods."

Reider v. Thompson, 339 U.S. 113, 119 (1950); Missouri, Kansas, & Texas R. Co. v. Ward, 244 U.S. 383, 386 (1917) (amendment's purpose was "to create in the initial carrier unity of responsibility for the transportation to destination"); Atlantic Coast Line R. Co. v. Riverside Mills,219 U.S. 186, 203 (1911) (amendment's purpose

> "is adapted to secure the rights of the shipper by securing unity of transportation wit unity of responsibility . . . [and] also facilities the remedy the responsible carrier").

Indeed, the Carmack Amendment imposes a form of strict liability on domestic common carriers. 49 U.S.C. § 11707 (a)(1) (applicable carriers "are liable to the person entitled to recover under the receipt or bill of lading" and "[f]ailiure to issue a receipt or bill of lading does not affect the liability of a carrier or freight forwarder"). As one commentator has written, the amendment codified the common law liability rule "that a common carrier is liable without proof of negligence for loss or damage to cargo unless it can establish one of the common law defenses, i.e., act of God, enemies of the King, inherent vice of the goods, etc., Saul Sorkin, Limited Liability in Multimodel Transport and the Effect of Deregulation, 13 Tul. Mar. L.J. 285, 291 (1989).

FEDERAL CASE LAW

In Harvest International, the Third District held that an ocean carrier was liable under the Carmack Amendment for damage to shipper's goods during the inland portion of the transport, because a second, separate bill of lading was issued for the

inland portion of the transport. 644 So.2d at 113. The Harvest International court relied on the Seventh Circuit's opinion in Capital Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391 (7th Cir. 1992), and the Eleventh Circuit's opinion in Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986). Although concurring specially, Jude Cope contended that these federal decisions were misconstrued in the Harvest International opinion, and they actually provide no support for applying the Carmack Amendment to an ocean carrier:

> In sum, the cases relied on by Harvest International were examining the Carmack Amendment coverage of United States defendants. The through bill of lading issued by the ocean carrier was relevant in order to determine whether the shipment carried within the United States was a continuation of foregoing commerce. Neither federal case held that an ocean carrier is covered by the Carmack Amendment.

Id. at 828. After the reviewing the majority opinion and Judge Cope's special concurrence, we agree with Judge Cope's analysis and adopt it as our own.

We concur in Judge Cope's view that neither Swift Textiles nor Capitol Converting supports the conclusion that an ocean carrier is covered by the Carmack Amendment simply because a through bill of lading is entered into by the ocean carrier, and a separate bill of lading is subsequently issued by the inland carrier. As Judge Cope pointed out, the ocean carriers in those cases were not parties to the dispute, Precision Cutting Services, Inc., 696 So.2d at 827-28, and, indeed, the carrier in Swift Textiles was not even identified in the opinion. Those cases concerned the liability of the inland carriers. The liability of the ocean carriers was not at issued in those disputes.

Specifically, the language quoted in Capitol

Converting, Harvest International, and the majority opinion below is based on the holding in Swift Textiles, that

> "when a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading."

799 F.2d at 701. The legal reasoning behind that holding remains valid, that inland carriers are subject to Carmack Amendment liability when a separate, domestic bill of lading is issued, even though a through bill of lading was issued abroad covering the same transport. However, no language in any of the cited federal opinions indicates an intended application of that rule to an ocean carrier, such as King Ocean. Moreover, we believe that an examination of the plain language of the parties' contract here, as well as the Carmack Amendment, leads to the same conclusion.

STATUTORY INTERPRETATION

In the Carmack Amendment's opening sentence, Congress limited its coverage to

> "common carrier[s] providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II or IV of chapter 105 of this title and . . . freight forwarder[s,]"

49 U.S.C. § 11707(a)(1) (1992), thus excluding those carriers covered under subchapter III, water carriers. Only

> "[t]hat carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission . . . are liable to the person entitled to recover under he receipt or bill of lading."

Id. Further, a civil action may be brought under the amendment only against the originating rail carrier, the delivering rail carrier, and the carrier alleged to have caused the loss or damage. Id. § 11707(d)(2)(A)(I)-(iii).

Therefore, by its own terms, the Carmack Amendment appears to apply only to inland carriers subject to the jurisdiction of the Interstate Commerce Commission. See Swift Textiles, 799 F.2d at 699 (recognizing that Carmack Amendment "applies when the ICC has jurisdiction over the shipment in question"). Indeed, the amendment even explicitly excludes "domestic"[5] water carriers from its coverage in subsection (c)(2):

> If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.[6]

Therefore, we agree with Judge Cope's conclusion that an ocean carrier's liability was not contemplated or covered under the Carmack Amendment. Precision Cutting Services, Inc., 696 So.2d at 829 (Cope, J., specially concurring).

CONTRACT INTERPRETATION

We also find that the plain language in the parties' bill of lading leaves no doubt that the parties intended that one-year limitation period of

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5 That is a carrier transporting goods from one state or United States territory or possession to another.

6 Interestingly, most domestic carriers apparently employ COGSA as the governing law in their bills of lading. Overview, 21 Tul. Mar.L.J. at 284.

COGSA would control the agreement. In its "Clause Paramount," the contract's preamble provides that "[t]his Bill of Lading shall have effect subject to the provisions of the 'Carriage of Goods by Sea Act 1936' (COGSA)." More importantly, the plain language of paragraph 7 of the bill of lading, titled "NOTICE OF LOSS, TIME BAR," expressly supports this conclusion:

> Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier [King Ocean] or his agents at the port of discharge or the place of delivery as the case may be before or at the time of removal of the goods into the custody of the merchant[,] such removal shall be prima facie evidence of the delivery by the Carrier of Goods as described in this Bill of Lading. If the loss or damage is not apparent, then notice must be given within three days of the delivery. <u>In any event, the Carrier shall be discharged from any liability unless suit is brought within one year after delivery of the Goods or the date when the Goods should have been delivered</u>. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process.

(Emphasis supplied). In the final analysis, King Ocean simply agreed, <u>by contract</u>, to be vicariously liable for any loss or damage to Precision's goods even after they left King Ocean's possession and while they were in the custody of the inland carrier but contractually limited its liability to the one-year term provided in COGSA. Without the provision accepting responsibility in the through bill of lading, precision's only recourse would be to pursue a statutory remedy against the inland carrier under the separate bill of lading and the Carmack Amendment. This is really no different than the

situation in Swift Textiles, where the Eleventh Circuit held that the owner of the goods had a statutory remedy under the Carmack Amendment against the inland carrier for damages incurred while the goods were in the inland carrier's custody. 799 F.2d at 701.

The contracting parties here clearly contemplated and agreed that if loss or damage occurred during the mainland journey, the ocean carrier would be liable, but

> "the Carrier [King Ocean] shall be discharged from any liability unless suit is brought within one year after delivery of the Goods or the date when the Goods should have been delivered."

These provisions speak for themselves. We find nothing within these provisions subjecting King Ocean to liability under the Carmack Amendment.

Hence, we conclude that the opinion in Harvest International was in error and predicated upon a misreading of the federal case law. While a colorable argument could be made that the paragraph in the bill of lading subjecting King Ocean to vicarious liability for the domestic carrier's actions, paragraph 4. (1), is ambiguous as to the applicable law and should therefore be construed against its drafter, King Ocean, we reject that notion for several reasons.[7] First, COGSA, is cited throughout the bill of lading as the controlling

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[7] Paragraph 4(1) provides:

> If it can be proved that the loss or damage occurred while the Goods were in the custody of an inland carrier the liability of the Carrier and the limitation thereof shall be determined in accordance with the inland carrier's contracts of carriage and tariffs, or in the absence of such contracts or tariffs, in accordance with the international law of the state where the loss or damage occurred.

law, while the Carmack Amendment is never mentioned. Second, paragraph 7 of the contract expressly and unambiguously provides that "[i]n any event, the Carrier shall be discharged from any liability unless suit is brought within one year after the delivery of the Goods or the date when the Goods should have been delivered." Clearly, by this unambiguous provision, King Ocean was expressly invoking COGSA's one-year statue of limitations to any liability it may have to the shipper. There is no reasonable interpretation of the partie's bill of lading to the contrary or that would yield a conclusion that the parties contemplated a sliding statue of limitations based on when and where any damage or loss occurred.

CONCLUSION

In its simplest form, the parties' agreement was that in the event of any loss or damage throughout the entire journey, King Ocean would assume responsibility subject to liability limitations granted it under COGSA. Therefore, Precision was relieved of the burden of possibly suing multiple parties or proving when and where the loss occurred because King Ocean assumed "unity of responsibility for the transportation to destination." Ward, 244 U.S. at 386. King Ocean was the only party that Precision would have to either file a claim with or suit against to recover any losses or damages. However, the contract just as clearly provided that an action against King Ocean must be brought within COGSA's one-year statute of limitations.[8]

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[8] While COGSA's scope is limited to international sea-going commerce to and from the United States, COGSA also provides, under the so-called "coastwise option, that

> "[a]ny bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such [domestic]ports, containing an express statement that it shall be subject to the provisions of this chapter."

46 U.S.C. App § 1312 (1992). One observer points out that

Accordingly, we quash the decision under review and approve and adopt Judge Cope's special concurring opinion and disapprove Harvest International for the reasons expressed above.

It is so ordered.

KOGAN, C.J., OVERTON, SHAW. HARDING and WELLS, J.J., and GRIMES. Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Third District - Case No. 96-1463

(Dade County)

Richard B. Austin, Miami, Florida, and Grehardt A. Schreiber, Miami, Florida,

for Petitioner

James C. Blecke of Deutsch & Blumberg, P.A., Miami, Florida, and Rex B. Guthrie, Miami, Florida, for Respondent

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"[i]n practice, carriers regularly take advantage of this option when drafting their bills of lading; accordingly most domestic shipments by sea are governed by COGSA." Overview, 21 Tul. Mar. L.J. at 284; see, e.g., Pan Am World Airways, Inc. v. California Stevedore & Ballast Co., 559 F.2d 1173, 1175 n.3 (9th Cir. 1977). Therefore, if Congress intended that COGSA's liability defenses be extended to interstate shipments via the sea lanes, it is reasonable to conclude that those same defenses attach when an ocean carrier assumes vicarious responsibility for what is undisputably a continuation of international commerce. As mentioned above, King Ocean included the express statement in its Clause Paramount that "[t]his Bill of Lading shall have effect subject to the provisions of the "Carriage of Goods by Sea Act 1936' (COGSA)."

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1997

PRECISION CUTTING SERVICES, INC.,	**	
	**	
Appellant,	**	
vs.	**	CASE NO. 96-1463
KING OCEAN CENTRAL AMERICA S.A.,	**	LOWER TRIBUNAL NO. 94-10895
	**	
Appellee.	**	

Opinion filed March 19, 1997.

An Appeal from the Circuit Court for Dade County, Leonard Rivking, Judge.

Rex B. Guthrie; Deutsch & Blumberg and James C. Blake, for appellant.

Schreiber, Rondon-Alvarez, and Gerhardt Schreiber, for appellee.

Before SCHWARTZ, C.J., and COPE and SHEVIN, JJ.

SHEVIN, Judge.

Precision Cutting Services, Inc. [Precision], appeals a summary judgment entered in favor of King Ocean Central America, S.A. [King Ocean]. We reserve.

King Ocean arranged to ship Precision's goods via ocean carrier from Costa Rica to Miami and overland from Miami to Little Rock,Arkansas, via motor carrier. In its bill of lading, King Ocean agred to be responsible for any loss or dmage to the goods while in the custody of the inland carrier.[1] The goods were allegedly stolen while in the custody of the inland motor carrier, Paradise Freightway, Inc., at Paradise's Miami freightyard. A separate bill of lading evidenced this portion of the transport. Precision filed an action against King Ocean to recover damages for the stolen goods. The action was file more than a year after the goods were stolen. The trial court entered summary judgment in favor of King Ocean ruling that this aciton was governed by the one-year statute of limitations as stated in the Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (6) (1992) [COGSA]. On appeal, Precison asserts that the Carmack Amendment, 49 U.S.C. § 11707 (1992), rather than COGSA, governs the action, and that the Carmack Amendment precludes a one-year limitaiton period.

We agree with Precision's assertion that pursuant to Harvest International, Inc. v. Tropical Shipping & Construction Co., 644 So.2d 112 (Fla. 3d DCA 1994), the Carmack Amendment governs this case.

1

Paragraph 4 (1) of King Ocean's bill of lading states:

If can be proved that the loss or damage occurred while the Goods were inteh custody of the inland carrier the liability of the [ocean] Carrier and the limitaion thereof shall be determined in accordance with the inland carrier's contracts of carriage and tariffs, or in the absence of such contracts or tariffs, in accordance with the international law of the stte where the loss or damage occurred.

The Harvest court stated that

> "[t]he Carmack Amendment does not apply 'to shipments by water, rail or motor carriers from a foreging country to the United States, . . . unless a domestic segment of the shipment is covered by a separte domestic bill of lading. '"

Harvest Int'l Inc., 644 So.2d at 113 (quoting Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F. 2d 391, 394 (7th Cir. 1992)) (emphasis added). Here, as in Harvest, the domestic inland portion of the shipment from a foregin country was covered by a separate bill of lading. Therefore, reversal is appropriate.[2] Accordingly, holding that the court erred in granting summary judgment based on COGSA's limitation period, we reverse the judgment and remand for further proceedings.

Reserved and remanded.

SCHWARTZ, C.J., concurs.
COPE, J. (specially concurring).

I am obliged to concur in light of this court's decision in Harvest International, Inc. v. Tropical Shipping and Construction Co., Ltd., 644 So. 2d 112 (Fla. 3d DCA 1994). In my view, however, Harvest International is wrongly decided.

I.

Plaintiff Precision Cutting Services, Inc. bought goods in Costa Rica and contracted with King Ocean Central America, S.A., an ocean carrier, to

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2 As to the statute of limitations, it is unnecessary for the King Ocean bill of lading "to extend the statute of limitiatons," special concurrence at p. 11 n. 3, when, as here, King Ocean "subjected itself to Carmack Amendment liability for the United States leg of the international journey." Id.

transport the goods. King Ocean issued a through bill of lading for shipment by sea to Miami, and then by motor carrie to Little Rock, Arkansas, the final destination. The container of goods was unloaded in Miami and picked up by a motor carrier for transportion to Little Rock. The motor carrier issued its own bill of lading. The motor carrier took the container to a Miami freight yard for temporaty storage, and it was stolen.

Precision Cutting sued King Ocean, amond others, arguing that King Ocean was liable to Precision Cutting under the Carmack Amendment, 49 U.S.C. § 14706,[3] and alternatively under the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300. The trial court ruled that King Ocean, the ocean carrier, was coverred by COGSA, not the Carmack Amendment. COGSA carries a one-year statute of limitations. 46 U.S.C. § 1303 (6). Since Precision Cutting filed suit more than one yar after the loss, the trial court found that the claim against King Ocean was time barred and entered summary judgment for King Ocean.

Precision Cutting has appealed, arguing that King Ocean covered by the Carmack Amendment, not COGSA. Precison Cutting seeks to take advantage of the Carmack Amendment's longer statute of limitations.

II.

Were it not for this Court's decision in Harvest International, the trial court ruling should be affirmed.

A leading treatise has summarized the

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[3] Formerly 49 U.S.C. § 11707 (prior to Jan. 1, 1996).

applicable rules as follows.

The Carmack Amendment covers:

> the liability of railroads, motor carriers, and freight forwarders under receipts and bills of lading . . . .
>
> The liability of water carriers for cargo loss and damage was not and is not covered by the Carmack Amendment provisons, but is determined by the bill of lading issued by the carrier by water. Liability of carriers of goods by sea is governed by the U.S. Carriage of Goods by Sea Act.

Saul Sorken, Goods in Transit § 1.19, at 1-126 to 1-27 (1996) (emphasis added; footnote omitted). The dividing lines are clear. The ocean carrier (King Ocean) is covered by COGSA, not the Carmack Amendment. The trial court ruling was correct as a matter of statutory interpretation.

Unfornatley, however, the decision in Harvest Intenational reached the opposite conclusion. It id not on the basis of a misreading of certain federal decisions.

The Harvest International opinion states:

> The Carmack Amendemtn imposes strict liability on certain carriers for the loss of goods. The Carmack amendment does not apply
>
> > "to shipments by water, rail or motor carriers from a foreing coutnry to the United States,. . . unless a domestic segmen of the shipment is covered by a separate domestic bill of lading."
>
> Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391, 394 (7th Cir. 1002) (citing Swift Textiles, Inc. v. Watkins Motor Lines,

Inc.,799 F.2d 697 701 (11th Cir. 1986).

644 So.2d at 113. Harvest International interpreted the cited federal cases to mean that if (a) the ocean carrier issued a through bill of lading which includes land transporation from the United Sttes port to the final destination in the United States; and (b) the land carrier issued a separate bill of lading covering the United States oveland leg of the journey; and (c) the loss occurred during the overland United States leg; then (d) the ocean carrier is liable under the Carmack Amendement. 644 So. 2d at 113.

In so holding, Harvest International miscontrued the federal decisions, Capitol Converting and Swift Textiles. What was at issue in the federal cases was the liability of the United States carier, not the ocean carrier.

The first case relied on by Harvest International was Swift Textiles, 799 F.2d 697. The issue in Swift Textiles was whether the Carmack Amendment applied to a Gergia intrastate trucker who hanled thefinal leg ofthe international journey, where the Georgia trucker never crossed state lines.

In Swift Textiles, Swift was an American comapny which bought goods from a Swiss manufacturer. 799 F.2d at 698. The goods were shipped by ocean carrier to Charleston, S.C., and trucked to Savannah, Georgia, for temporary storage. Swift's customs broker then hired the defendant Watkins Motor Lines, a Georgia trucker, to move the containers from Savannah, Georgia, to LaGrange, Georgia, which was the final destination. Id. There was an accident during Watkin's Savannah-to-LaGrange part of the trip, and Swift sued Watkins.

The legal issue was whether Watkins, a Georgia intrastate trucker, was covered by the Carmack

Amendment, given that Watkins' contract only covered within-Georgia transportation--an intrastae shipment. Construing the then-existing version of the Carmack Amendment, the Swift Textiles court said:

> The Carmack Amendment applies when the ICC has jurisdiciton over the shipment in question, 49 U.S.C. § 11707 (a). Among the shipments over which the ICC has jurisdiciton are shipments over whcih the ICC has jurisdiciton are shipments "between a place in . . . the United States and a place in a foreing country to the extent the transportaiton is in the United States . . . ." 49 U.S.C. § 10521 (a) (1) (E) (the "continuation of foreing commerce" provision).
>
> . . . .
>
> Thus, the critical inquiry is not whether the domestic leg of the shipment crossed a state border but rather it is whether the domesitc leg of the shiipment was inteneded to be part of a larger shipment originating in a foreign country . . . .
>
> We therefore hold that when a shipment of foreing goods is sent to the United States with the intention that it come to a final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.

Id. at 699, 701 (emphasis added).

The significance of the through bill of lading becomes clear. It reveals that the entire journey for this shipment involved interstae and foreing

commerce. Although Watkins' final leg was soley within Georgia, Watkings had nonetheless undertaken responsibility for carriage of goods which had moved interstate and foreign commerce. This was sufficient to bring Watkins' within-Georgia journey under the coverage of the Carmack Amendment.

Swift Textiles is quite clear that the Carmack Amendment applies only to the domestic (United States) carrier on the United States leg of the journy, i.e., Watkins. Swift Textiles did not impose liability on the ocean carrier, which was not a party to the appeal.

The Harvest International panel also relied on the federal Capitol Converting decision, 965 F.2d 391. That reliance was also misplaced. In Capitol Converting, Capitol purchased equipment in Italy and hired a freight forwarder, LEP Transport, Inc., to arrange transportiaotn from Italy to Chicago, Illinois. The Ocean shipment was unloaded in Norfold, Virginia, and for unexplained reasons was sold by the U.S. Customs Services. 965 F.2d at 393.

Capitol sued LEP, its United States freight forwarder, for loss of the shipment. Freight forwarders are covered by the Carmack Amendment. Relying on Swift Textiles, the Capitol Converting court said:

> The Carmack Amendment is an amendment to the Interstae Commerce Act that imposes liability oncertain carriers for the loss of goods. 49 U.S.C. § 11707; . . . It applies to "a common carrier providing transporation or services subject to the jurisdiction of the Interstaet Commerce Commissin under subchapter I, II, or IV if chapter 105 of this title." 49 U.S.C. § 11707. This jurisdiction does not extend to shipments by water, rail or motor carriers from a foreign country to the United States, see 49

> U.S.C. §§ 10501, 10561, unless a domestic segment of the shipment is covered by a separate domestic bill of lading. Swift Textiles, Inc. v. Waktins Motor Lines, Inc., 799 F.2d 697, 701 (11th Cir. 1986), cert. denied, 480 U.S. 935, 107 S. Ct. 1577, 94 L.Ed. 2d to govern a shipment throughout its transportation from abroad to its final destination in the United States is termed a "through" bill of lading. Because such a "through" bill of lading includes no separate domestic segment as described above, the Carmack Amendment is inapplicable. See Swift Textiles, 799 F.2d at 701; . .

965 F.2d at 394 (emphasis added; some citations omitted). Since no domestic (United States) bill of lding had ever been issued for the United States leg of the international journey, the Capitol Converting court held that the Carmack Amendment did not apply to the United States defendant.

The Capitol Converting court, like Swift Textiles, was concerned solely with whether the United States defendant was liable for the loss under the Carmack Amendment where the loss occurred during the United States leg of an international shipment. In Capitol Converting, the ocean carrie was not a defendant, see id. at 393, and Capitol Converting in no way authorizes application of the Carmack Amendment to the ocean carrier.[4]

In sum, the cases relied on by Harvest

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4 As previously mentioned, the Carmack Amendment applies to freight forwaders. Saul Sorken, Goods in Transit § 1.19, at 1-126. In Capital Converting the parties disagreed on whether defendant LEP met the statutory definition of a freight forwarder. 965 F.2d at 394 n.4. The court found it unnecessary to reach that issue.

International were examining the Carmack Amendment coverage of United States defendants. The through bill of lading issued by the ocean carrier was relevnt inorder to determine whether the shipment caried within the United States was a continunation of foreign commerce. Neither federal case held that an ocean carrier is covered by the Carmack Amendment.

In support of its claim that an ocean carrier is coverd by the Carmack Amendment, Precision Cutting Also cites a federal district court decision, Canon U.S.A. Inc. v. Nippon Liner System, Ltd., 1994 AMC 348 (N.D. Ill. 1992). That case does not support Precision Cutting's position. In Canon U.S.A., the ocean carrier States carriers handling the United States leg of the international shipment. Id. at 353. The final leg of the journey was handled by an Illinois trucker who carried the godos from Chicago, Illinois, to Wood Dale, Illinois. During the final leg, there was an accident and resulting damage to the shipment. Relying on Swift Textiles, the federal district court held that the United States trucker was covered by the Carmack Amendment because the final, within-Illinois leg of the journey was a continuation of foreign commerce. Id. at 358. The court denied the Illinois trucker's motion for summary judgment on the Carmack issue. Id. Since the ocean carrier had agreed to be contractually liable if the Illinois shipper was found to be negligent, the cour ruled that the ocean carrier was potentially liable under the Carmack Amendment. Id.

Canon U.S.A. stands for the proposition that the ocean carrier can by contract make itself vicariously liable for the United States carrier's liability under the Carmack Amendment.[5] Canon U.S.A

5

I agree with the majority opinion's observation that, "in its bill of lading, King Ocean agreed to be responsible for any loss or damage to the goods while in the custody of the inland

does not hold that an ocean carrier has statutory liability under the Carmack Amendment. [6]

The Harvest International opinion held that the Carmack Amendment applies to an ocean carrier so long as there is a through bill of lading and a separate bill of lading for the domestic leg of the international shipment. 644 So.2d at 112. For the reasons explained above, that ruling is incorrect.

III.

We must follow Harvest International until such time as it is revisited by this court en banc or by the Florida Supreme Court. Consequently, I am obliged to concur.

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carrier." Majority opinion at 2 (footnote omitted). By contract King Ocean has agreed to be vicariously liable for loss of the goods while in the hands of the inland carrier. Since the inland carrier in this case is subject to the Carmack Amendment, King Ocean has in effect subjected itself to Carmack Amendment liability for the United States leg of the international journey.

The problem is that King Ocean bill of lading does not extend the statute of limiations. Consequently, Precision Cutting's lawsuit had to be file within one year limitation period of COGSA.

6

On the issue the Canon U.S.A. district court decison has been overruled sub silento by the Seventh Cirucit decision in Capitol Converting. The Canon U.S.A. court in Capitol Converting that in order to create Carmack Amendemtn liability the domestic leg of he journey must be covered by a separate bill of lading. 1994 AMC at 358, questioning Capitol Converting Equipment v. LEP Transport, 750 F. Supp. 862 (N.D. Ill. 1990). However, the Capitol Converting decision was affirmed by the Seventh Circuit. 965 F.2d at 394-95. The Canon U.S.A. decision had therefore been overruled to the extent of any inconsistency with Capitol Converting.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICITON DIVISION
CASE NO. 94-10895 CA 21

PRECISION CUTTING SERVICES,
INC.,

Plaintiff

vs.

KING OCEAN CENTRAL AMERICA, S.A.,
PARADISE FREIGHTWAYS, INC., and
MARTAINER, INC.,

Defendants.

_____/

SUMMARY JUDGMENT AS TO KING OCEAN CENTRAL AMERICA, S.A.

Plaintiff's loss occurred on June 1, 1993. This suit was filed on June 13, 1993. This suit was filed on June 13, 1994. COGSA and no Carmack is the applicalbe law to the circumstances of this case. Therefore, the one year statute of limitations is a bar to the action. The Defendant, King Ocean Central America, S.A.'s motion for summary jdugment is granted. Plaintiff take nothing by this action against Defendant, King Ocean Central America, S.A. and said defendant go hence without day with its cost to be taxed upon application.

ORDERED Miami, Dade County, Florida this 8th day of May, 1996.

_____
LEONARD RIVKIND
Circuit Court Judge

copy furnished to:
RICHARD B. AUSTIN, ESQ.
SCOTT J. FRANK, ESQ.
GERHARDT A. SCHREIBER, ESQ.
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MANUEL A. GARCIA-LINARES, ESQ.

Supreme Court, U.S.
F I L E D
FEB 1 1999
CLERK

No. 98-959

In The

Supreme Court of the United States

October Term, 1998

PRECISION CUTTING SERVICES, INC.,

Petitioner,

vs.

KING OCEAN CENTRAL AMERICA, S.A.,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO QUESTIONS PRESENTED

Petitioner has mis-characterized the current law and its application to the facts of this case in the questions presented by adding the phrase " . . . [W]hen the clear language of COGSA makes it effective only during the ocean voyage "tackle to tackle" and the clear language of Carmack makes it effective during the entire overland carriage?"

The terms of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (COGSA) can be extended to the inland carriage by agreement between the parties, *Brown & Root, Inc., v. M/V Peisander,* 648 F.2d 415, 1982 AMC 929 (5th Cir. 1981) and can include other parties by what is known as the "Clause Paramount" and "Himalayan Clause". In addition, the Carmack Amendment, 49 U.S.C. § 11707, on its face, applies only to carriers subject to Phase I, II, and IV of the Interstate Commerce Act.

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Respondent King Ocean Central America, S.A., pursuant to Rule 29.6, provides the following list of the parent companies and nonwholly owned subsidiaries of King Ocean Central America, S.A.:

1. King Ocean Central America, S.A. – a parent company.

King Ocean Central America, S.A. has no subsidiaries.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, King Ocean Central America, S.A. (King Ocean), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Supreme Court of Florida's opinion in this case. That opinion is reported at 717 So.2d 507, 1998 AMC 2372 (Fla. 1998).

REPLY TO JURISDICTION

The date of the Supreme Court of Florida's opinion is June 12, 1998, not January 12, 1998.

REPLY TO STATEMENT OF THE CASE

King Ocean submits the following Reply to Statement of the Case to present to the Court the areas of disagreement with the statement submitted by Petitioner.

Petitioner has misstated the intent of Congress. The intent of Congress was and is to provide for a one year statute of limitations for ocean common carriers which, in the advent of inter-modal transport services, can be extended by agreement to cover the inland portion of the carriage. This extension has been authorized and approved by the federal courts and ratified by Congress by its failure to pass any corrective legislation. In contrast, Congress has specifically enacted a two year statute of limitations, provided the carrier received a written

claim within nine months of delivery, for the inland common carriers subject to the jurisdiction of the Interstate Commerce Act. The two year statute of limitations begins to run from the date of written denial of the filing of the claim. In fact, petitioner is asking this Court to override the intent of Congress by applying a new statute of limitations to both the ocean and inland common carriers.

Petitioner's contention that there is a conflict between the two federal statutes, 46 U.S.C. §§ 1300-1315 and 49 U.S.C. § 11707, and the holdings of the Eleventh Circuit Court, *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987) and the Supreme Court of Florida is incorrect. A review of the applicable statutes and the opinions clearly show that the only conflict is between the ruling of the Third District Court of Appeals of Florida in *Harvest International, Inc., v Tropical Shipping & Construction Co., Ltd.*, 644 So.2d 112 (Fla. 3d DCA 1994) and those various federal decisions.

The Supreme Court of Florida's opinion, *Precision Cutting Services, Inc. v. King Ocean Central America, S.A.*, 717 So.2d 507, 1998 AMC 2372 (Fla. 1998) and Judge Cope's specially concurring opinion, Appendix-C, pg. 3 of Petitioner's brief, are consistent with the applicable federal law.

Petitioner's statement that King Ocean conceded that COGSA had no application and that the extension of COGSA by agreement was not raised at the trial level is incorrect. King Ocean's position throughout the proceedings was that COGSA applied pursuant to the terms and conditions of its bill of lading.

Petitioner's reliance on *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987) is misplaced. In *Swift* the question presented was whether the inland carrier was subject to state (Georgia) law or the Carmack Amendment. Additionally, there was no through ocean bill of lading.

All of the cases relied upon by the Petitioner do not involve the liability of an ocean carrier under its bill of lading for inland transportation.

REASON WHY THE PETITION SHOULD BE DENIED

There is no conflict between the terms of the Carriage of Goods by Sea Act, the holdings of the various federal courts and the ruling of the Supreme Court of Florida. In fact, they are consistent.

CONCLUSION

Foe these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated February 1, 1999.